

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 276

THE SECURITY FLOUR MILLS COMPANY, PETITIONER
v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The case involves an income tax question, arising as an aftermath to the invalidation of the processing taxes imposed by the Agricultural Adjustment Act. The taxpayer, a manufacturer and seller of wheat flour, is on the accrual basis. In 1935, it increased the prices of its flour to include the amount of the tax. During that year, however, it obtained a temporary injunction against further collection of the taxes on the condition that it file returns and pay the amounts shown to be due to a designated depository. The Agricultural Adjustment Act was declared un-

(1)

constitutional January 6, 1936 (*United States v. Butler*, 297 U. S. 1); thereafter the injunction was made permanent and the impounded taxes were returned to the taxpayer. In 1936, 1937, and 1938; a part of the refunded taxes was voluntarily returned by the taxpayer to its vendees. The primary question presented by the petition is whether the taxpayer is entitled to deduct from its gross income for 1935 these payments to customers which it made in 1936, 1937, and 1938.

Section 43 of the Revenue Act of 1934, c. 277, 48 Stat. 680, provides that deductions shall be taken in the taxable year "in which 'paid or accrued' * * *, dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period." The taxpayer claims the right to take the deduction in 1935 by virtue of the "unless" clause in this section. The court below reversed the Board of Tax Appeals and sustained the Commissioner in denying this claim.

We think the decision below is correct. In a similar case, however, the Circuit Court of Appeals for the Eighth Circuit has held for the taxpayer. *Commissioner v. Cannon Valley Milling Co.*, 129 F. 2d 642. The court below (R. 68-69) correctly pointed out that the two cases are distinguishable in the degree of proof offered by the

taxpayer to show a distortion of income, and declared no rule of law contrary to the *Cannon Valley* decision. Nevertheless, it is fairly arguable that the two cases are basically inconsistent since they apply Section 43 differently in similar situations.¹

It is perhaps doubtful that the Court will deem this an appropriate case for certiorari, but we do not oppose the granting of the writ.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1943.

¹ The same question is pending before the Circuit Court of Appeals for the Third Circuit in *Commissioner v. Blaine, Mackay, Lee Co.*, Nos. 8109, 8110.